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Brief of Smith for Respondents

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.  
Filed Feb. 17, 1898.

In the Matter of the Application of the De La Vergne Refrigerating Machine Company for a Writ of Certiorari.

THE DE LA VERGNE REFRIGERATING  
MACHINE COMPANY,

Petitioner,

vs.

GERMAN SAVINGS INSTITUTION, ET AL.,

Respondents.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT.

STATEMENT, BRIEF AND ARGUMENT ON  
BEHALF OF RESPONDENTS.

ELENEIOUS SMITH,  
B. SCHNURMACHER,  
LEO RASSIEUR,

Attorneys for Respondents.



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STATEMENT.

The suggestion of the Judge of the Circuit Court  
of Appeals upon which petitioner claims to act was,  
*as we understood it, that petitioner might, if it saw*

fit, apply to this Honorable Court for a writ of *certiorari*, in view of the division of the Circuit Court of Appeals on the one question of *ultra vires* in these causes.

These causes, brought in 1892, have been twice decided by the United States Circuit of Appeals for the Eighth Circuit, both times in favor of the respondents and substantially upon the same record; in the last decision the court decided every point in favor of the respondents except the single question whether or not the contract, which is the basis of these actions, is *ultra vires* The De La Vergne Refrigerating Machine Company, upon which question the two judges, who last heard the case, were divided in opinion.

Assuming that it is proper to attempt to aid this honorable court in getting the facts out of a somewhat voluminous record which bear upon the only question in this case which did not receive the unanimous concurrence of the judge of the Circuit Court and of all the judges of the Circuit Court of Appeals, and upon which this application for a writ of *certiorari* seems to be in the main based, we respectfully submit for consideration that an examination of the contract upon which these suits are based (set out *in haec verba* in the motion at page 3) will disclose the following clearly marked features or component parts thereof, viz :

(a) Date of contract and parties thereto, being The Consolidated Ice Machine Company, party of the first part; the respondents in this petition (plaintiffs who have obtained the judgments from which petitioners appealed to the Circuit Court of

Appeals), all of the stockholders of the said Consolidated Ice Machine Company, parties of the second part; the petitioner, The De La Vergne Refrigerating Machine Company, party of the third part, and John C. De La Vergne, party of the fourth part.

(b) A preamble setting forth the legal status of the party of the first part, which company had made an assignment for the benefit of its creditors; the belief that its assets, consisting in part of its good will, exceeded in value the amount of its liabilities; the desire of the party of the third part (petitioner) to acquire such rights as said parties of the *first* and second parts could assign in said assets subject to said first party's obligations; the provision of the Illinois law with reference to the right of the first party to again obtain possession of these assets; the legal status of the party of the third part, the amount of its capital stock, and the net value of its assets; and the further fact that the said party of the third part was then considering a plan of increasing its capital stock from \$350,000 to \$2,000,000, the assets being valued at \$1,400,000, of which \$1,050,000, or 300% should be issued to its stockholders as a dividend.

(c) A statement of the consideration moving the said parties in the making of the contract.

(d) First. A covenant and agreement of the *first* and second parts with the parties of the third and fourth parts to convey, and a conveyance pursuant thereto by the parties of the *first* part and the parties of the second part unto the party of the third part of all their right, title and interest in and to the

assets of said party of the first part, consisting in part of the good will, subject to its obligations and subject to the legal custody of the assignee.

(e) Second. A covenant and agreement on the part of the parties of the third and fourth parts, (petitioner company and John C. De La Vergne individually) to and with the parties of the first and second parts to issue unto the parties of the second part full paid stock in the party of the third part to the amount of \$100,000, in proportions therein set out, and which proportions the evidence in the cause proved was the exact proportions in which said second parties held stock in said party of the first part, the Consolidated Ice Machine Co.

(f) Third. A covenant and agreement on the part of the parties of the third and fourth parts that the net value of the assets of the party of the third part was \$1,400,000, not including the "*assets and rights*" purchased under the agreement under consideration, and that the stock to be issued to the parties of the second part by the De La Vergne Company should represent not less than one-fifteenth part of said assets after the addition of the Consolidated Company's rights or assets, and that no additional stock should be issued by said De La Vergne Company without receiving actual and full value for such additional stock; that the parties of the second part should have the privilege of examining the assets of said De La Vergne Company, and if such assets failed to verify the statements set forth in the preamble regarding value, that then the parties of the second part should have the right to demand that

said stock in the De La Vergne Company be made to accord with the covenant regarding its value, and that an examination of said assets, in good faith, by purchasers of at least \$100,000 of additional stock, with notice of such examination to the parties of the second part, should be conclusive on said second parties of the value of said De La Vergne Company's assets.

(g) Fourth. Agreement of the parties of the second part "for the purpose of placing the party of the third part in complete control of the assets (including good will) of the party of the third part," to assign, within ten days after date of said contract, to the party of the fourth part, for the benefit of the party of the third part, all the stock of the party of the first part which was issued and regarding which it was guaranteed that it was full paid, and an agreement of the parties of the third and fourth parts, within sixty days thereafter, to issue and deliver to said parties of the second part, in the proportions already referred to, the said stock of the third party to the amount of \$100,000.

(h) Fifth. A covenant on the part of the parties of the second part to accept, in lieu of said stock in the De La Vergne Company, the sum of \$100,000 in cash, at option of the party of the fourth part.

(i) Sixth. Expression of understanding that the party of the third part should not be held to have made itself liable for the debts of the party of the first part.

(j) Seventh. A covenant and agreement on the part of the parties of the second part with the parties

of the third and fourth parts for a period of ten years from the date of contract not to enter into the business of selling refrigerating or ice-making machines, directly or indirectly, in the United States, except in Montana, and except also in the business of the party of the third part, or of such company as becomes successor to said third party or purchaser of all its rights.

Before calling attention to specific parts of the contract, it may not be improper to suggest that since the Consolidated Ice Machine Company undertook by the contract to sell its right to re-acquire its good will and other assets, in other words, made a sale which had the legal effect of precluding it from again going into the business for which it was incorporated, it was legally necessary, and rightfully so, that all of the stockholders who were interested in the use of its capital as indicated by its charter, should join in the said conveyance and make it effective, and thus estop the stockholders from contending that the corporation exceeded its powers. Furthermore, since the contract of sale also conveyed away all of its remaining rights in its assets (namely, its so-called equity of redemption in its other assets) and reduced them to stock in the De La Vergne Company or cash at the option of John C. De La Vergne, it was deemed right and proper to make distribution at once to the stockholders of the company of such proceeds as would be realized out of its equity of redemption and which by the contract of the company could no longer be used in said corporate business.

It will be observed from an inspection of the contract :

First. That the *Consolidated Ice Machine Company*, in which was lodged the right to re-acquire the title and which had a perfect right to dispose of its said right or so-called equity of redemption in its assets, is the party of the first part, and *makes* the conveyance in the contract.

Second. That the parties of the second part, the stockholders, merely join therein to evidence their consent to a conveyance of its right to re-acquire the equity in its good will, a part of said assets, and to a conveyance of all of its rights in said assets, an unusual conveyance which might otherwise have been questioned by any one of the said stockholders.

Third. That the preamble, which undertakes to set out the existing conditions of the companies and their assets and the purpose of the agreement, clearly indicates such purpose on the part of the petitioner to have been to "acquire such rights as the said parties of the FIRST and second parts can assign in and to said assets" making no reference whatever to a purchase of the stock certificates of the said parties of the second part.

Fourth. That the paragraph of said contract beginning with the word "First" describes the right conveyed therein and simply refers to it as being "all their right, title and interest in and to the assets of the said party of the first part, etc.," and makes no mention whatever of certificates of stock.

Fifth. That the next paragraph beginning with the word "Second," provides the consideration for

the above conveyance, to-wit, \$100,000 of stock in the De La Vergne Company, but makes no mention that the said consideration is to be delivered for anything else than the interest or right in the assets transferred by the prior paragraph.

Sixth. That the following paragraph, to-wit, the "Third," shows what was added to the assets of the petitioner by the purchase contracted for by this agreement, and speaks of this addition as "the assets and rights purchased under this agreement," using the words which had theretofore been used in describing the right to the assets subject to the obligations of the party of the first part, but in no way intimating that valid certificates or shares of stock would be thereby added to such assets of the De La Vergne Company, or that they represented value.

Seventh. That the "Fourth" paragraph indicates that the transfer of the certificates of stock was to be made merely "for the purpose of placing the said party of the third part in complete control of the assets of the party of the first part, subject to the legal rights of said assignee and the creditors of said party of the first part," and leaves no room for the contention that the certificates of stock were the subject of the sale. All the assets of the Consolidated Company having been theretofore, by the preceding part of the contract, conveyed away, and provision having therein been fully made for the distribution of the proceeds to the stockholders, as per their holdings of stock, in satisfaction of their demands, as evidenced by their respective certificates of stock, there was no longer any value in said cer-

tificates as *certificates of stock*, except possibly as a muniment of title, and in order that the purchaser of the rights in the assets might be put in complete control of the same, subject to the creditors' rights, the assignment of said certificates was required to be made.

Eighth. That it may be assumed that no person would have had inserted the provision marked "Sixth" in the said contract if the same had been a contract for the purchase of certificates of stock, and not for the purchase of certain rights in assets subject to liabilities.

Ninth. That paragraph "Seventh" would not have been written so as to make the former stockholders of the Consolidated Ice Machine Co. covenant not to enter the business of selling refrigerating and ice making machinery, directly or indirectly, without noting as a further exception thereto the business of the Consolidated Company, if such corporation had been deemed an existing one, or one whose affairs had not been wound up by this contract, or one which the De La Vergne Company could have rehabilitated or given new life to.

We respectfully submit that the contract, taken as a whole, clearly demonstrates that the subject of the sale was the right to reacquire the assets, including the good will of the Consolidated Ice Machine Co., by payment of its obligations or consent of its creditors, or what may not inaptly be termed the equity of redemption in those assets, and not the certificates of stock of said Consolidated Co.

2nd. That the sale to the petitioners by the Consolidated Company of its right to reacquire its assets and good will had the effect legally of prohibiting the Consolidated Ice Machine Co. from continuing the business for which it had received corporate power.

3rd. That the legal effect of the acceptance by the Consolidated Company and its stockholders of the covenant of the third and fourth parties to pay cash or issue the stock to be received as a consideration for the equity in the assets including the good will of the Consolidated Ice Machine Co. directly to the stockholders of said Consolidated Company in the proportions in which they held stock in said Company, was a distribution of said fund to said stockholders pursuant to the principles of law underlying the creation of corporations, and left the certificates of stock of said Consolidated Ice Machine Co. without any value whatever, in fact as valueless in every way as a satisfied or discharged note of hand, or a mortgage or deed of trust which was originally given to secure such discharged or satisfied note.

4th. That the paragraph of the contract marked "Fourth," which refers to the assignment of said certificates of stock of the Consolidated Ice Machine Company by its stockholders to John C. De La Vergne for the benefit of the petitioner, on its face shows that said certificates were not to be assigned to him as subsisting certificates of stock representing value in said company (such certificates to which the doctrine of *ultra vires* invoked in this cause was

intended to be applied) but merely as further evidence of ownership of rights in the assets and because the purchaser of the right to re-acquire the assets supposed that said certificates furnished an additional muniment of the right to re-acquire the title to the assets, including the good will of the Consolidated Ice Machine Company, subject, however, to the payment of its obligations, in addition to the conveyance in the contract. That the parties so understood and substantially so expressed the object of the assignment by said paragraph seems to us to be fairly shown by the first clause thereof, which reads, "For the purpose of placing the said party of the third part in complete control of the assets of the party of the first part, subject to the legal rights of the said assignee and the creditors of the party of the first part."

5th. That the covenant of the former stockholders of the Consolidated Ice Machine Company not to enter into the business of selling refrigerating or ice-making machines, directly or indirectly, in certain parts of the United States excepting in the business of the party of the third part, or of such company as became its successor, also tends to show the winding up of the Consolidated Ice Machine Company and the substantial cancellation of its stock certificates.

Inasmuch as the petitioner, by its statement of facts, undertakes to convey the impression that these cases, as presented by the record at the last hearing thereof in the United States Circuit Court of Appeals are entirely different from the ones presented

by the record at the first hearing by said court, and inasmuch as this honorable court may deem it of essential importance in passing upon the petition at bar to determine whether or not the two records are substantially the same, we respectfully call attention to the fact that the first record merely contained as evidence the agreed statement of facts, set out in full on pages 12 to 26, inclusive, of the petition for the writ of certiorari. That the Circuit Court of Appeals, in its opinion, by a full bench, decided as follows thereon, to-wit:

Judge Sanborn delivered the opinion of the court.

“The German Savings Institution, a corporation, the plaintiff in error, brought an action against the De La Vergne Refrigerating Machine Company, a corporation, and John C. De La Vergne, the principal stockholder of that corporation, the defendants in error, for that portion of the purchase price of the assets, good will and capital stock of the Consolidated Ice Machine Company, a corporation, which the defendants in error promised to pay to it by a written agreement made on April 16, 1891. The plaintiff was a stockholder of the Consolidated Ice Machine Company, and the defendants answered that the plaintiff and his co-stockholders had failed to assign the stock of that company as they had promised to do in this agreement. The case was tried by the court upon an agreed statement of facts, and a judgment was rendered for the defendants. These were the material facts:

“The De La Vergne Refrigerating Machine Company, hereafter called the De La Vergne Company, was a corporation of the State of New York, and

"the Consolidated Ice Machine Company, hereafter  
 "called the Consolidated Company, was a corpora-  
 "tion of the State of Illinois. These corporations  
 "were engaged in manufacturing and selling ice-  
 "making machines and were rivals in that business.  
 "On October 14, 1890, the Consolidated Company  
 "made a general assignment for the benefit of its  
 "creditors. On April 16, 1891, that company and  
 "its stockholders, one of whom was the plaintiff,  
 "made a bill of sale and an agreement with the De  
 "La Vergne Company and De La Vergne which re-  
 "cites that, 'whereas \* \* \* the assets of  
 "the said party of the first part (the Consol-  
 "idated Company) in the opinion of the said  
 "party of the second part (its stockholders), exceed  
 "in value the liabilities thereof, and consists in part  
 "of the good will of said party of the first part  
 "(which good will has been established by six  
 "years of successful manufacture of refrigerating  
 "and ice-making machines, together with an ex-  
 "penditure of the earnings from such manufacture),  
 "and whereas the said party of the third part (the  
 "De La Vergne Company) is willing to acquire such  
 "rights as the said parties of the first and second  
 "parts can assign in and to the said assets, subject  
 "to the obligations of said party of the first part; \* \*  
 "Now, therefore, in view of the premises, and for  
 "and in consideration of the mutual advantages to  
 "be gained by the execution of this contract,' the  
 "Consolidated Company and its stockholders 'agree  
 "and covenant to and with the parties of the third  
 "and fourth parts (the De La Vergne Company and  
 "De La Vergne) to bargain, sell and convey, and

“ by these presents do bargain, sell and convey unto  
“ the said party of the third part, all their right, title  
“ and interest in and to the assets of the said party  
“ of the first part, subject to the payment of its obli-  
“ gations;’ the De La Vergne Company and De La  
“ Vergne covenanted and agreed to issue to the  
“ plaintiff in error the full paid capital stock of the De  
“ La Vergne Company to the amount of twenty-five  
“ hundred dollars par value, to issue to its co-stock-  
“ holders a proportionate amount of such stock so  
“ that all the stockholders would receive in the ag-  
“ gregate \$100,000 in such stock; the stockholders  
“ of the Consolidated Company agreed to assign to  
“ De La Vergne, within ten days from the date of  
“ the agreement, all the full paid stock of the Con-  
“ solidated Company, which was one thousand  
“ shares, to take \$100,000 in cash in lieu of the  
“ \$100,000 in stock of the De La Vergne Company;  
“ and promised and agreed not to enter into the  
“ business of selling ice-making machines in the  
“ United States, except in the State of Montana, for  
“ ten years, and the De La Vergne Company and  
“ De La Vergne agreed to issue the one hundred  
“ thousand dollars of capital stock in the De La  
“ Vergne Company to the stockholders of the Con-  
“ solidated Company within sixty days after the  
“ stock of the latter company was assigned to De La  
“ Vergne. Within ten days after the date of this  
“ agreement, the certificates which represented the  
“ one thousand shares of the stock of the Consoli-  
“ dated Company, and written assignments of that  
“ stock executed by the parties who held the cer-  
“ tificates, were delivered to De La Vergne, but one

“hundred and twenty-five of these shares were held  
“by P. J. Lingenfelder and Leo Rassieur as ex-  
“ecutors, and ninety shares were held by them as  
“trustees, under the will of E. Jungenfeld, deceased,  
“and they assigned these shares without an order  
“authorizing them so to do from the probate court  
“in the State of Missouri in which the estate of  
“Jungenfeld was in the process of administration.  
“On April 27, 1891, four specific defects in the assign-  
“ments of the thousand shares of stock were pointed  
“out by counsel for De La Vergne, and the means of  
“curing them were suggested. On April 29, 1891,  
“these defects were cured by the delivery to the  
“counsel of De La Vergne of suitable instruments  
“of further assurance of title. No objection was  
“made in this letter or at any time prior to April 10,  
“1893, that the assignments of the executors and  
“trustees were insufficient because no order of the  
“probate court had been obtained authorizing the  
“assignment. On the other hand, the counsel for  
“De La Vergne wrote on April 27, 1891, respecting  
“twenty-five of these shares, ‘These shares are  
“transferred by the signature of P. J. Lingenfelder  
“and Leo Rassieur, executors of Ed Jungenfeld,  
“deceased, which, of course, would be regular.’  
“In July, 1891, the former stockholders of the Con-  
“solidated Company demanded the \$100,000 of cap-  
“ital stock in the De La Vergne Company, but they  
“received no response to their demand until Sep-  
“tember 12, 1891, when the counsel for De La  
“Vergne objected to issuing and delivering this  
“stock on several frivolous grounds, one of which  
“was that the stock of the Consolidated Company

" had not been assigned *in time*, and wrote, 'Pend-  
 " ing further information on these points, I have  
 " still in my possession the papers which you have  
 " sent me, and sent to Mr. De La Vergne, which of  
 " course if my views as above expressed are correct,  
 " I am ready to pass over to whoever is legally en-  
 " titled to the custody of the same, which is a ques-  
 " tion which I am not willing personally to decide.'  
 " The right to the assets of the Consolidated Com-  
 " pany subject to its liabilities, and the good will of  
 " its business, which are conveyed to the De La  
 " Vergne Company by the bill of sale and agree-  
 " ment of April 16, 1891, were never reconveyed;  
 " the covenant of the stockholders to refrain from  
 " transacting the ice making business for ten years  
 " was never released, and none of the certificates  
 " and assignments of the stock of that company  
 " were ever delivered back to its former stockhold-  
 " ers. It is assigned as error that upon this state of  
 " facts the judgment should have been for the plain-  
 " tiff.

" One who receives the benefits of the substantial  
 " performance of a contract, and retains them, after  
 " a technical default in the performance by his ad-  
 " versary, until it is impossible to put the latter in  
 " the situation in which he was when the contract  
 " was made, and when the default occurred, cannot  
 " entirely defeat an action for the specific perform-  
 " ance of the contract or an action for the price  
 " named in the agreement on the ground that the  
 " plaintiff has failed to completely perform the con-  
 " tract on his part. When a contract has been par-  
 " tially performed and one of the parties to it makes

“ default, the other has a choice of remedies. He  
 “ may and he must rescind or affirm the contract,  
 “ but he cannot do both. If he would rescind it, he  
 “ must immediately return whatever of value he has  
 “ received under it, and then he may defend against  
 “ an action for specific performance, or for the price  
 “ of the property (if the agreement was a contract  
 “ of sale) and he may recover back whatever he has  
 “ paid or delivered under it. On the other hand, he  
 “ may, and if he retains its benefits he does affirm  
 “ the contract, and in that case he can maintain a  
 “ suit for specific performance against his adversary  
 “ or an action for damages for failure to perform, or  
 “ he may, if opportunity offers, offset those damages  
 “ against the amount he has agreed to pay under the  
 “ contract. He cannot, however, while he retains  
 “ the benefits of a substantial performance totally  
 “ defeat an action for the price which he has agreed  
 “ to pay or for the specific performance of the con-  
 “ tract on his part, on the ground that the plaintiff  
 “ has not completed the performance required of him  
 “ by the contract. He cannot at the same time  
 “ affirm the contract by retaining its benefits and re-  
 “ scind it by repudiating its burdens. *Hunt v. Silk*,  
 “ 5 East 449; *Hammond, Assignee of Ford*, v.  
 “ *Buckmaster*, 22 Vt. 375; *Brown v. Witter*, 10  
 “ Ohio 143; *Dodsworth v. Hercules Iron Works*, 13  
 “ C. C. A. 552, 557; 66 Fed. Rep. 483. *Swain v.*  
 “ *Seamens*, 9 Wall. 254, 272; *Beck v. Bridgman*,  
 “ 40 Ark. 382, 390; *Andrews v. Hensler*, 6 Wall.  
 “ 254, 258; *Conner v. Henderson*, 15 Mass. 319,  
 “ 321; *Teter v. Hinders*, 19 Ind. 93; *Howard v.*  
 “ *Hayes*, 47 N. Y. Sup. Ct. (Jones & Spencer) 89,

" 103; *Welsh v. Gossler*, 47 N. Y. Sup. Ct. (Jones  
 " & Spencer) 104, 112; *Underwood v. Wolf*, 131  
 " Ill. 425; *Brown v. Foster*, 108 N. Y. 387; *Van-*  
 " *derbilt v. Eagle Iron Works*, 25 Wend. 665; *Lyon*  
 " *v. Bertram*, 20 How. 149, 153, 154, 155; *Clark*  
 " *v. Wheeling Steel Works*, 53 Fed. Rep. 494, 499;  
 " *Voorhees v. Earl*, 2 Hill. 288, 294; *Barnett v.*  
 " *Stanton*, 2 Ala. 181; *Churchill v. Holton*, 38  
 " Minn. 519; *Treadwell v. Reynolds*, 21 Am. &  
 " Eng. Encyc. of Law 557, note 2. The reason of  
 " this principle is, that the retention of the benefits  
 " of substantial performance after default, is utterly  
 " inconsistent with the position that the default has  
 " released the party who has received these benefits  
 " so that he is not bound to perform his part of the  
 " contract. It is a silent notice that performance will  
 " be required of the defaulter and will be made by the  
 " recipient of the benefits. The retention of the  
 " rights or properties deprives the defaulting party  
 " of all use of them, when if they were reconveyed  
 " to him at once upon default, he might immediately  
 " sell them to another for their value or use them  
 " himself to his own advantage. When, therefore,  
 " one has retained such property or the benefits de-  
 " rived from such a contract without any claim that  
 " default has been made or any notice of an intention  
 " to refuse performance, for so long a time after the  
 " default that the defaulting party has been deprived  
 " of a substantial part of their value or their use, it  
 " is unjust and inequitable to permit the recipient of  
 " the benefits to totally defeat an action for the con-  
 " tract price. The just rule is, that the contract  
 " must then stand, that an action upon the contract

“can be maintained by him who has substantially  
 “performed notwithstanding his technical default,  
 “and that the amount of the recovery will be meas-  
 “ured by the contract price less the damages sus-  
 “tained by the defendant from the failure of the  
 “plaintiff to complete the performance on his part.

“This rule applies to executory contracts of all  
 “kinds—to contracts for the exchange, for the leas-  
 “ing, and for the sale of real estate (*Beck v. Bridg-*  
 “*man, Hunt v. Silk; Teter v. Hinders, Brown v.*  
 “*Witter, Swain v. Seamens, supra*)—to contracts  
 “for the manufacture and sale of machinery and  
 “goods (*Hammond, Assignee of Ford v. Buckmas-*  
 “*ter, Dodsworth v. Hercules Iron Works, Andrews*  
 “*v. Hensler, Howard v. Hayes, supra*)—and to  
 “contracts for the sale of personal property (*Lyon*  
 “*v. Bertram, Clark v. Wheeling Steel Works, and*  
 “other authorities cited *supra*).

“In *Beck v. Bridgman*, 40 Ark. 382, 390, Bridg-  
 “man brought an action against Mrs. Beck to com-  
 “pel specific performance of a contract between  
 “them to exchange real and personal property.  
 “Mrs. Beck had taken possession of Bridgman’s  
 “real estate in Illinois, which was covered by the  
 “contract, and he had given her title to all but ten  
 “acres of it, but he could not and never did procure  
 “for her the title to this ten acres. She refused to  
 “convey to Bridgman her lands in Arkansas cov-  
 “ered by the contract, because he had not conveyed  
 “this ten acres, and insisted that he could not  
 “recover on the contract because he had not com-  
 “pleted and could not complete the performance of  
 “it on his part. The court enforced specific per-

“formance and allowed Mrs. Beck \$300 for the failure of Bridgman to convey the ten acres. Judge Eakin in delivering the opinion of the Supreme Court of Arkansas, which affirmed this decree, said: ‘To allow her to hold all she could get of the Illinois property and give nothing in exchange would be absolutely shocking.’

“In *Hammond, Assignee of Ford v. Buckmaster*, 22 Vt. 375, 379, 380, Ford had agreed with Buckmaster, the defendant, to manufacture wool furnished by him into cloth and to deliver the cloth to him from time to time as it was manufactured. The defendant agreed to sell and consign the cloth, to advance to Ford one-third of the selling price as fast as the cloth was consigned, and to pay to him the residue of the price when it was collected, less the value of the wool. Some cloth had been delivered to the defendant and had been sold and consigned by him. Hammond, the assignee of Ford, sued him for the advances he had promised to make on these consignments and alleged performance on the part of Ford. The defense was that Ford had not performed his part of the contract, but had converted some of the cloth made from the wool of the defendant to his own use. The trial court charged the jury that if this was true it was a good defense to the action. The Supreme Court of Vermont said: ‘If the charge of the court can be sustained, it must be upon the ground, that a breach of the contract on the part of Ford gave to the defendant the right to repudiate it. But it could not have that effect. The general rule of law is, that a contract cannot

"be rescinded by one party, for the default of the  
 "other, unless both parties can be placed *in statu*  
 "*quo*, as before the contract. In the present case  
 "the contract had been in part executed, and each  
 "party had received a partial benefit from the con-  
 "tract, and the parties could not be placed *in statu*  
 "*quo*. The agreement in this case must stand and  
 "the defendant must perform his part of it; and if  
 "there has been a breach of the contract by the  
 "other party, he must seek a compensation in dam-  
 "ages of such party by a cross action.'

"In *Hunt v. Silk*, 5 East, 449, Silk agreed to  
 "make certain alterations in a dwelling house and to  
 "execute a lease to Hunt within ten days. There-  
 "upon Hunt paid Silk ten pounds, and took and re-  
 "tained possession of the house for twelve days.  
 "Silk failed to make the alterations within the ten  
 "days, and in twelve days Hunt surrendered posses-  
 "sion and sued for his ten pounds. Lord Ellenbor-  
 "ough said: 'Now where a contract is to be re-  
 "scinded at all, it must be rescinded in toto, and the  
 "parties put in statu quo. \* \* \* If the plaintiff  
 "might occupy the premises two days beyond the  
 "time when the repairs were to have been done and  
 "the lease executed, and yet rescind the contract,  
 "why might he not rescind it after a twelvemonth  
 "on the same account. This objection cannot be  
 "gotten rid of: the parties cannot be put in statu  
 "quo.' These expressions in this opinion, and the  
 "decision that Hunt could not recover in that case  
 "were quoted with approval by the Supreme Court  
 "in *Lyon v. Bertram*, 20 How. 149, 153, 154.

"Perhaps these cases sufficiently illustrate the rule

“ we have been considering, and in our opinion the  
“ case at bar falls far within it and must be governed  
“ by it. Conceding that the two hundred and fifteen  
“ shares of the capital stock of the Consolidated  
“ Company which were held by Lingenfelder and  
“ Rassieur as executors or trustees, were never legally  
“ assigned to De La Vergne, because the assignments  
“ made and delivered on April 26, 1891, were not  
“ authorized by any order of the probate court, the  
“ facts remain that the Consolidated Company and  
“ its stockholders substantially performed their part  
“ of this contract and that the defendants received  
“ and retained all the benefits of their performance.  
“ The rights and benefits which the defendants were  
“ to receive from this contract were, the right of the  
“ Consolidated Company to its assets subject to the  
“ payment of its debts, the good will of its business  
“ which had been established for six years, the sup-  
“ pression of the competition of that company and of its  
“ stockholders, and the legal control of the suppressed  
“ corporation. The consideration the defendants  
“ were to pay for these interests was one hundred  
“ thousand dollars in stock or in money. They re-  
“ ceived, retained and had the benefit of all these  
“ rights and interests, and now refuse to pay the  
“ agreed price, because the stockholders of the Con-  
“ solidated Company failed to completely perform  
“ their contract in that they did not legally assign to  
“ De La Vergne, who received assignments of more  
“ than three-fourths of its stock, less than one-fourth  
“ of the stock of a corporation that had conveyed  
“ away all of its assets and the good will of its busi-  
“ ness. There is nothing in this record to show that

“this small minority of the stock was of any value.  
“If it was, the defendants may undoubtedly show  
“that fact under proper pleadings and offset the  
“damage they have sustained by the failure to assign  
“it, against the \$100,000 they promised to pay for  
“the substantial benefits of this contract. But this  
“is the limit of their defense, and the burden is upon  
“them to establish it. There is no evidence in this  
“record that it has any substantial merit, and it is  
“exceedingly difficult to see how the failure to assign  
“this small minority of the stock could have resulted  
“in any damage to them whatever. However that  
“may be, they did receive and retain the right of  
“the corporation to its assets subject to its debts,  
“the good will of its business, the suppression of the  
“competition of the corporation and its stockholders,  
“and, by the valid assignment of more than three-  
“fourths of its stock, the legal control of the cor-  
“poration. These would seem to be all the benefits,  
“and they were certainly all the substantial benefits  
“they could have received from the complete and  
“technical performance of the contract. After the  
“conveyance and covenant of April 16, 1891, was  
“executed and delivered, the corporation was nothing  
“but an empty shell. All its valuable rights and  
“property had been vested in the De La Vergne  
“Company, and the legal control of the shell itself  
“was given to De La Vergne by the valid assign-  
“ment of a majority of the stock of the corporation.  
“These defendants cannot retain these benefits and  
“thus make \$100,000 for themselves, and throw a  
“loss of \$100,000 on the stockholders of this cor-  
“poration because they technically failed to perform

“ their contract in the slight and immaterial particular that they did not legally assign a small minority of this stock.

“ In the statement in this opinion that the defendants received and retained all the substantial benefits of this contract, we have not overlooked the contention of counsel for the defendants that the letter of their counsel on September 12, 1891, constituted an offer to return the certificates and assignments of the stock and should, in law, have the effect of their redelivery. That letter was, in substance, a refusal to pay the purchase price for frivolous reasons, one of which was that the assignments were not made in time, because, although they were delivered before April 27, 1891, some powers of attorney and instruments of further assurance of title were, at the suggestion of the counsel for De La Vergne, forwarded to him two days later, and a statement that if his views were correct he was ready to pass over the papers which he and De La Vergne had received, to whomsoever was legally entitled to the custody of the same, which, he wrote, was a question he was unwilling to decide. It is not easy to see how this letter was an offer to return anything. It was an offer to deliver papers to some one on condition that his views were correct, but his views were not correct. The stipulation in the contract for a delivery of the assignments within ten days from its date was for the benefit of the defendants, and when their counsel, after the expiration of the ten days, and after the assignments were delivered, pointed out certain objections to them and suggested that these objec-

"tions should be remedied by instruments of further  
 "assurance, and the stockholders of the Consoli-  
 "dated Company complied with his suggestion and  
 "forwarded these instruments within two days, and  
 "no farther objection was made to the sufficiency of  
 "their performance of the contract until September  
 "12, 1891, that was a waiver of the objection that  
 "these instruments were not delivered in time, if, in-  
 "deed, it was not a waiver of every objection to them.  
 "*Raymond v. San Gabriel Val. Land & Water*  
 "*Company*, 4 C. C. A. 89, 53 Fed. Rep. 883; *Wil-*  
 "*coxson v. Stitt*, 4 Pac. Rep. 429; *Smith v. Mohn*,  
 "25 Pac. Rep. 696; *Kelly v. Berry*, 39 Wis. 669,  
 "672; *Smith v. Pettee*, 70 N. Y. 13, 17; *Morgan*  
 "*v. Herrick*, 21 Ill. 481; *Irvine v. Gregory*, 13  
 "Gray 215; *Knox v. Schoenthal*, 13 N. Y. Sup. 7, 8.

"Moreover, an offer to deliver these papers to the  
 "unknown person who was legally entitled to them,  
 "was not an offer to deliver them to the stockhold-  
 "ers of the Consolidated Company. The person  
 "entitled to them was De La Vergne.

"Further, an offer to return them on September  
 "12, 1891, if sufficient in form would have been an  
 "idle ceremony. The defendants had undoubtedly  
 "then derived all the benefits of a performance of  
 "the contract by the Consolidated Company and its  
 "stockholders that they could ever derive. They  
 "still held the right to its assets subject to its debts,  
 "the good will of its business, and the covenant of  
 "its stockholders which suppressed its competition.  
 "No doubt they had secured its customers and de-  
 "stroyed all possible competition. The return to  
 "the stockholders of the control over the empty

“shell of their corporation would have been a useless  
 “act. A merchant cannot, by offering to return  
 “the empty box, successfully defend an action for  
 “the purchase price of a box of goods, on the  
 “ground that the box was defective, when he has  
 “received and sold the goods. The purchaser of a  
 “note and a mortgage securing it cannot, by offer-  
 “ing to reassign the mortgage, after he has col-  
 “lected and surrendered the note, successfully de-  
 “fend an action for the purchase price, on the  
 “ground that the assignment of the mortgage to  
 “him was defective. And the defendants could  
 “not, after receiving and retaining for three months  
 “the right of this corporation to its assets subject  
 “to its debts, and the good will of its business, and  
 “after destroying its competition, by offering to  
 “return the control of the corporation shorn of its  
 “property and rights, defeat the action for the price  
 “they agreed to pay because they had not received  
 “legal assignments of a minority of its stock.

“The contention that this action for the specific  
 “performance of this contract cannot be maintained  
 “under the decisions in *Norrington v. Wright*, 115  
 “U. S. 188; *Hoare v. Rennie*, 5 H. & N. 19;  
 “*Bowes v. Shand*, L. R. 2 App. Cas. 455; *Honck*  
 “*v. Muller*, L. R. 7 Q. B. D. 92; *Reuter v. Sala*,  
 “L. R. 4 C. P. D. 239, and like cases, until the  
 “plaintiff proves a complete and technical perform-  
 “ance of the contract on the part of the Consoli-  
 “dated Company and its stockholders, has not  
 “escaped consideration. The distinction between  
 “those cases and the case at bar is, that the defend-  
 “ants in the former had not received and retained

“anything under the contracts, for which they had  
 “not paid the contract price, while the defendants  
 “in this case have received and retained all the ben-  
 “efits of a substantial performance of the contract  
 “and have paid nothing. Those were actions for  
 “the purchase price of goods, no part of which had  
 “been accepted and used by the defendants without  
 “paying therefor. This is an action for the pur-  
 “chase price of property and rights which the de-  
 “fendants have received and enjoyed the benefits  
 “of. The distinction is clearly pointed out by the  
 “Circuit Court of Appeals of the Third Circuit in  
 “*Clark v. Wheeling Steel Works*, 53 Fed. Rep. 494,  
 “498, where that court justly remarks: ‘If the  
 “defendants in *Norrington v. Wright* had retained  
 “and used the railroad iron delivered to them after  
 “they had discovered the seller’s failure to ship the  
 “stipulated quantities in February and March, they  
 “would not have been justified in rescinding their  
 “contract.’ This distinction is noted by Mr. Jus-  
 “tice Gray in the opinion in *Norrington v. Wright*,  
 “where he says: ‘This case wholly differs from  
 “that of *Lyon v. Bertram*, 20 How. 149, in which  
 “the buyer of a specific lot of goods accepted and  
 “used part of them with full means of previously  
 “ascertaining whether they conformed to the con-  
 “tract.’ The case at bar is not ruled by *Norrington*  
 “*v. Wright* and like cases, but falls within the  
 “principle announced at the opening of this opinion  
 “and is governed by *Lyon v. Bertram* and other  
 “cases cited in support of it.

“If it is said that the defendants were not aware  
 “that the assignments made by the executors and

"trustees were not authorized by orders of the pro-  
 "bate court, and hence that they were excused from  
 "rejecting them and returning the property which  
 "they had received, the answer is, that it was as  
 "easy for them to ascertain that fact in May and  
 "June of 1891, when these parties could have been  
 "placed *in statu quo*, as it was on April 10, 1893,  
 "after they had derived all the benefits of the con-  
 "tract, when they first raised the point by their  
 "answer in this case. Moreover, the rule *caveat*  
 "*emptor* governed them. They knew the law. They  
 "had notice of all the facts that the diligent inquiry  
 "of a reasonably prudent man would have discovered,  
 "and they had reserved to themselves by the con-  
 "tract sixty days after the assignments were deliv-  
 "ered, to examine them and decide upon their suf-  
 "ficiency before they were required to pay. The  
 "fact that the assignments were executed by execu-  
 "tors and trustees was notice sufficient to cast upon  
 "them the duty to investigate the authority of these  
 "officers, to object to it if insufficient, and to return  
 "the property they had received within the sixty  
 "days provided by the contract, or to forever after  
 "hold their peace. They could not lawfully refuse  
 "to investigate this question until they had appro-  
 "priated to themselves all the benefits of the con-  
 "tract and made it impossible for them to restore  
 "the Consolidated Company to their original situa-  
 "tion, and then for the first time make the investi-  
 "gation and repudiate their obligations under the  
 "contract.

"The judgment below must be reversed and the

“cause remanded with directions to grant a new trial, and it is so ordered.”

That the petitioner company and its co-defendant in said suits, the late John C. De La Vergne, filed amended answers in the said causes; but notwithstanding that part of the above decision which informed them that they might offset the damages they might have sustained by a failure to receive duly authorized assignments of all of the certificates of stock of the Consolidated, they failed to set up any such damage as a set off. The amended answers set up the same defenses as were made in the original answers, and in addition thereto contended that defendant De La Vergne had no authority to execute the contract for the petitioner company, and also set up at length want of power on the part of the two companies to enter into such a contract.

The evidence, which is contained in the record of the second hearing, consisted of the same agreed statement of facts which had been used at the first hearing, and which was offered at the last hearing by respondents, and evidence of the representative character of William C. Richardson, duly elected and qualified as Public Administrator of the City of St. Louis, as administrator of defendant, John C. De La Vergne, deceased, who had entered his appearance and adopted the amended answers of said defendant in the said suits, after the suggestion of the death of said defendant, and against whom the Circuit Court had duly revived said suits. (Rec., pp. 25 and 26.) Petitioner company offered in evidence depositions taken at Chicago, for the purpose of showing that respondents had broken their covenant

not to enter the business in which they had been engaged, and that they had abandoned the contract; it was incidentally established by such depositions that John Featherstones' Sons, of Chicago, was engaged in manufacturing the pattern of ice refrigerating machines, known to the trade as the Consolidated, before the assignment of the Consolidated Company, and after its assignment, by the consent of the assignee, and subsequently as purchaser of the right from the assignee. (Rec., p. 118.)

They also introduced depositions taken in New York, taken at the office of the petitioner company, for the purpose of showing that it had not authorized Mr. De La Vergne, its President, to make the contract, and had received nothing by reason thereof. The evidence shows the following, viz: that the De La Vergne Company, which was organized December 27th, 1880 (R. 300), had at the time of making the contract 3,500 shares, par value of \$100 each, of which John C. De La Vergne owned 3,100 shares (R. 208), and Louis E. De La Vergne, Louis Block and Charles H. Cone, three of the five directors or trustees of the company, each one share, which were presented to them by John C. De La Vergne (R. 245-246); that the De La Vergne Company by its agent, H. W. Guernsey, as early as January, 1891, more than three months before the making of the contract, was engaged at an expense of \$50 per day in examining the assets of the Consolidated Company, the total expense thus incurred and paid by it (De La Vergne Company) being \$1,020.61 (R. 206 and 327); that such examination which was finished February 4th, 1891, as per the account for services rendered,

disclosed that the net value of the assets of the Consolidated Company, not including its good will or patterns or drawings, and making due allowances for the cost of finishing the work of incompletd plants, expenses of realizing on outstandings, in his opinion, was \$44,179.10, and in the opinion of the Consolidated Company was \$163,566.53 over and above all liabilities; the latter estimate, however, including a valuation of a little over \$30,000 for patterns and drawings (R. 345, 346, 249, 250). That the good will of the Consolidated Company, according to one of the defendant's own witnesses, was worth, or rather could not have been acquired with an expenditure of less than \$50,000, and that the patterns and drawings had cost about \$100,000 (R. 272); that it had obtained orders or contracts in the sum of about \$1,300,000, in the year of its failure (1890), largely in the East, where Joseph Koenigsberg was its agent, and that such business had been taken at profitable figures or at higher prices than prior thereto; that the company had failed merely because of insufficient capital with which to do its work (R. 270-271).

The services of Mr. Koenigsberg, the Eastern agent, were deemed very valuable by Mr. De La Vergne (R. 355), and hence he was asked to sign and did sign the contract, consenting to and ratifying the same, although not named as a party therein (R. 46). The certificates of stock of the Consolidated Company were delivered on Saturday, April 25th, 1891, to Mr. De La Vergne within the ten days required by the terms of the contract, dated April 16th, 1891 (R. 47), and six days thereafter,

to-wit, on May 1st, 1891, a contract was entered into by the De La Vergne Company with said Koenigsberg (R. 304), by which he was bound for three years to serve the De La Vergne Company in its business, *or in the business of the Consolidated Ice Machine Company "as he might be directed to do;"* that thereupon Koenigsberg, while employed by the De La Vergne Company, rented the branch office of the Consolidated Company *in his own name* (R. 269 and 274), employed the former employes of the Consolidated Company *in his own name*, sought business *in his own name*, *as the former Eastern agent of the Consolidated Company*, paid all these outlays with his own checks, *but rendered a weekly account to the De La Vergne Company of such outlays and his salary and was thus reimbursed* (R. 266, 278, 279). In other words, while in the employ of the De La Vergne Company he held out to the world by his acts, and presumably by his statements, that he was continuing in the business as successor of the Consolidated Ice Machine Company. On September 14th, 1891, two days after the date of the letter in which Mr. Fitch, the attorney of the De La Vergne Company endeavored to state reasons for non-compliance by his client with their obligations under their contract with respondents, a circular appeared in which Koenigsberg announces his severance of all business connection with the Consolidated Company and his purpose to carry on *a business of his own at the old stand of the Consolidated Company* (R. 403). On September 15th, 1891, a letter was written by Mr. Banning, the patent attorney of the De La Vergne Company, to Mr. Fitch, the gen-

eral attorney, a copy of which appears in the said company's letter book (R. 404), wherein the patent attorney desires advice how best to modify the old card of the Consolidated Company *for use by Mr. Koenigsberg*. On October 15th, 1891, another advertisement appeared in a journal known as "The Western Brewer, etc." (R. 404, 363, 277), in which the De La Vergne Company, through its employe, Joseph Koenigsberg, without disclosing the name of the principal, apparently seeks trade on the strength of the name and good will of the Consolidated Ice Machine Company and on the prestige gained by 250 Consolidated machines in successful operation (R. 278).

The evidence also shows that the De La Vergne Company never made any arrangements to build machinery of the consolidated pattern (Rec., p. 200); that Mr. Koenigsberg received proposals from the Featherstones' Sons for the building of such machinery *in his own name* (Rec., pp. 279, 317), and finally, *in his own name*, made a contract with the Featherstones' Sons which created him their exclusive agent in the East (Rec., p. 356); and in no instance disclosing that he was in the employ of the De La Vergne Company, or acting as its agent (Rec., p. 279). The machines were billed by Featherstones' Sons to Mr. Koenigsberg (Rec., p. 306), and amounted to about \$45,000 (Rec., p. 210).

The contracts procured by Mr. Koenigsberg for machinery of the Consolidated pattern from May 1st, 1891, until the termination of his contract with the De La Vergne Company *were made in his own name and afterwards assigned to the De La Vergne*

*Company* (Rec., pp. 314, 315, 319, 322, 324, 325). The bonds given by Mr. Koenigsberg for the completion of machinery and protecting the purchasers against infringement claims were signed by Mr. De La Vergne as surety (Rec., pp. 318, 323, 327). Mr. Adolph Bender, the general manager of the De La Vergne Company, testified that he had no knowledge of Mr. Koenigsberg's employment (Rec., pp. 199, 204).

The record also shows that the increase of stock by the De La Vergne Company from \$350,000 to \$2,000,000, had been voted for February 4th, 1891, long before the contract was made (Rec., p. 207).

It further appears from the evidence that John R. Waters was employed in May, 1891, by petitioner company to purchase claims against the Consolidated Company, or procure contracts or options for such claims (Rec., p. 214), at an expense to the company of \$1000, \$712.02 and \$952.14, which were duly paid (Rec., pp. 338, 339, 341). That his reports to his employer, though called for, were not produced by Baron, the witness of petitioner company, by direction of its counsel, although in the possession of the witness (Rec., pp. 229, 230, 232 and 233). That said Waters, in July, 1891, made an offer in the name of the petitioner company of \$25,000 for the machinery, plant and goodwill of the Consolidated Company (Rec., p. 149).

That immediately after April 16th, 1891, to-wit, April 18th, 1891, Mr. De La Vergne obtained a letter from the assignee which gave him an opportunity and permission to inspect all the unfinished plants of the Consolidated Company (R. 334). Thereafter

he corresponded with the assignee regarding the affairs of the Consolidated Company as one interested in the same, and acted as advisor in the settlement of accounts outstanding, and the De La Verge Company thereafter furnished such small repairs as were required in the east (R., 329, 330, 331, 332.).

It further appears from the depositions that the evidence to which attention has just been called was elicited from defendant's own witnesses notwithstanding instructions of counsel for defendant company to one of said witnesses (Baron) to refuse to produce evidence under the control of such witness and which was located in the office of the defendant company (where the deposition was being taken), but kept in a book which said witness testified belonged to the estate of defendant John C. De La Vergne, and notwithstanding the refusal of such witness based upon such instructions to produce important evidence. (R., 229, 230, 232 and 233.)

It will be evident from the evidence as set out that the record of the cause as last tried is substantially the same as upon the first trial, and that the evidence taken in New York furnishes strong foundation for the views entertained and expressed by the Circuit Court of Appeals in its first opinion.

Upon request of the petitioner herein, the trial court made a special finding of the facts, and found them to be as they were set forth in the agreed statement, except as modified in the finding; the modification consisted in an express finding of no abandonment of the contract, no violation by respondents of their covenant, and that when the contract was entered into the value of the Consoli-

dated Company's assets and good will, *in the opinion of the petitioner* and its co-defendant, exceeded said assignor's liabilities.

Accordingly the Circuit Court rendered judgment for the respondents, and upon the hearing of the writ of error sued out by the petitioner alone, the Circuit Court of Appeals, in its *per curiam* opinion, decided that all the questions involved in the case should be determined in favor of the respondents, except the single question as to whether or not the contract is *ultra vires* the De La Vergne Co., upon which the judges were divided, and thereupon affirmed the judgment of the Circuit Court by a divided court.

It is now proposed by this petition to procure another hearing of these causes in this court.

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## BRIEF.

### I.

The doctrine of *ultra vires* does not apply to the facts of this case under the statutes of the State of New York, under which the De La Vergne Company was organized.

Sec. 2, Chapter 333, Laws 1853, p. 1961,  
Vol. 3, 1889, Rev. Stat. N. Y.

Sec. 3, Chapter 838, Laws 1866, p. 1967,  
Vol. 3, 1889, Rev. Stat. N. Y.

## II.

The doctrine of *ultra vires* does not apply to this case because the stock certificates mentioned in the contract were no longer valid certificates of subsisting stock in the Consolidated Ice Machine Company. The membership was dissolved "by unanimous consent of the members of the company."

Morawetz, Sec. 311.

"Ordinary private trading companies may at any time put an end to their transactions and voluntarily wind up their affairs."

Morawetz, Sec. 651.

## III.

If the contract sued on can be fairly construed to be within the power granted to the De La Vergne Company, and at the same time admits of the construction that it be *ultra vires* such company, then the court will give such construction as will uphold the same.

*Shore v. Wilson*, 9 Clark & F., 397.

*Noonan v. Bradley*, 9 Wal., 394, 407.

*Ormes v. Deuchy*, 82 N. Y., 443.

*Curtis v. Gokey*, 68 N. Y., 304.

*Sheffield v. Balmer*, 52 Mo., 474.

*Crittenden v. French*, 21 Ills., 598.

*Coke's Co. Lit*, 42, 183.

*Parson on Contracts*, 8th Ed., Vol. 2, p. 618.

*Jones on Construction of Contracts*, sec. 223, 224.

*Bishop on Contracts*, sec. 392.

## IV.

The refusal of the trial court to declare the law of this case or make special declarations of the law as prayed by petitioner was not error, since the cause was tried by the court upon a waiver of a jury.

*Mercantile Mutual Ins. Co. v. Folsom*, 18 Wal., 237.

"The refusal of the trial court to find immaterial or *incidental* facts, amounting only to evidence bearing on the *ultimate facts found* is not a proper subject of review."

*Hathaway v. Bank*, 134 U. S., 494.

"A special finding of facts by the court need only state the *ultimate facts*, not the evidence."

*Mining Co. v. Taylor*, 100 U. S., 37.

## V.

The granting of the writ of certiorari by the Supreme Court is a branch of its jurisdiction which, it has held, "should be exercised sparingly and with great caution and only in cases of peculiar gravity and general importance," or in cases requiring the exercise of such jurisdiction to secure uniformity of decision.

*Ex parte Lau Ow Bew*, 141 U. S., 583.

*In re Woods*, 143 U. S., 202.

*American Constrction Co. v. Railroad Co.*,  
148 U. S., 372.

## ARGUMENT.

### I.

The doctrine of *ultra vires* does not apply to the facts of this case because the statutes of the State of New York, under which the De La Vergne Company was organized, gave full power to such corporation to make the contract sued on, even though the certificates of stock mentioned therein were essential to reacquire the title to the assets of the Consolidated Ice Machine Company under the insolvent laws of Illinois.

The De La Vergne Refrigerating Machine Company was organized December 27th, 1880, under the general incorporation act of the State of New York, adopted in 1848 and the amendments thereto; it is true, as is stated by counsel for petitioner, that section 8 of the general law provides as follows:

“It shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation.”

It is, however, *not true* that the law of New York continued to prohibit investments by one manufacturing company in the stock of another until the enactment of 1890, referred to by counsel for petitioner.

By the laws of 1853 power was given to manufacturing corporations in the State of New York to acquire “*mines, manufactories AND OTHER PROPERTY NECESSARY FOR THEIR BUSINESS,*” which statute reads as follows:

“Sec. 2, Chap. 333, Laws 1853.—The trustees of  
 “such company may purchase mines, manufactories  
 “and *other property necessary for their business*,  
 “and issue stock to the amount of the value thereof  
 “in payment therefor, and the stock so issued shall  
 “be declared and taken to be full stock.” (Statutes  
 of 1889, p. 1961.)

It was further provided by an act of 1866 that  
 stock in a manufacturing corporation *might be ac-*  
*quired* by such a corporation and that the officers of  
 the purchasing corporation might hold and be eligible  
 to the office of trustees of such corporation the same  
 as if they held the stock therein individually, which  
 act reads as follows :

“Sec. 3, Chap. 838, Laws 1866.—It shall be law-  
 “ful for any company heretofore or hereafter organ-  
 “ized under the provisions of this act, or the act  
 “hereby amended, *to hold stock* in the capital of  
 “any corporation engaged in the business of mining,  
 “*manufacturing*, or transporting such materials as  
 “are required in the prosecution of the business of  
 “such company, so long as they shall furnish or  
 “transport such materials for the use of such com-  
 “pany and for two years thereafter and no longer;  
 “and also *to hold stock* in the capital of any corpor-  
 “ation which shall use or manufacture material  
 “mined or produced by such company; and the  
 “trustees of such company shall have the same  
 “power with reference to *the purchase of such stock*  
 “*and issuing stock therefor* as are now given by the  
 “law with reference to the purchase of mines, man-  
 “ufactories and other property necessary to the  
 “business of mining, manufacturing and other com-

“panies (Laws of 1853, *supra*). But the capital  
 “stock of such company shall not be increased with-  
 “out the consent of the owners of two-thirds of the  
 “stock, to be obtained as provided by Sec. 21 and  
 “22 of the act hereby amended.

“Sec. 4. When any such manufacturing com-  
 “pany shall be a stockholder in any other corpora-  
 “tion its president or other officers shall be eligible  
 “to the office of trustee of such corporation, the  
 “same as if they were individually stockholders  
 “therein (Statutes of New York 1889, p. 1963,  
 “Vol. 3).”

These laws were in full force and effect at the time of the organization of the De La Vergne Company, and at the time when the contract sued on was made.

It is clear that ample power is given to the De La Vergne Company to make the purchase of the right to the manufacturing establishment and other assets, including good will, of the Consolidated Ice Machine Company, notwithstanding the fact that such purchase was made subject to the liabilities of the creditors thereof. And if it became necessary to secure a vehicle for the complete transfer of such assets, these statutes are amply broad to cover the purchase of the power contained in the satisfied certificates of stock of the vendor company. The language of the statute is that such “manufactories and *other necessary property*” may be purchased.

In this case it is urged by the De La Vergne Company that it could not obtain possession of the property purchased by it, under the insolvent laws of Illinois, without the consent of the assignor com-

pany, and that such consent could only have been obtained in writing by acquiring the stock of the Consolidated Company. It may very well be said, therefore, that the power still contained in the certificates of stock was a necessary power to complete and perfect the acquiring of the property of the Consolidated Company and taking the same out of the hands of the assignee.

The law of 1866, however, plainly gave petitioner the power to acquire the stock of the Consolidated Ice Machine Company, it being a company engaged in the same kind of business in which the De La Vergne Company was engaged and manufacturing articles used and required by it (Rec., p. 210).

The Act of 1866 makes ample provision for representation of the purchasing corporation in the board of trustees or directors of the vendor corporation, and thus places the purchaser in a position to avail itself of all the rights which the ownership of stock confers.

Whether the foregoing sections of the Statutes of New York were omitted from the brief of counsel for petitioner through inadvertence or otherwise we do not know; but certain it is that they bear upon the issue of "*ultra vires*" presented in this case and are much more applicable and in point on the discussion of this question than the law of 1890, which went into effect on May 1st, 1891, after the execution of the contract in evidence, and which law is set out in full by counsel, together with an argument to establish that *that law* of 1890 did not cover the stock transferred in this case.

It is also insisted that the contract is void because it bound the De La Vergne Company to increase its capital stock. In answer to this proposition, we refer to that section of the law of 1853, above quoted, which plainly authorizes the increase of a corporation's stock for the purpose set forth in this contract.

If, however, it be urged that this law did not fully authorize the petitioner company to increase its capital, as counsel contend was the purpose and intent of this contract, then we submit that the contract did not necessarily OBLIGATE the De La Vergne Company to increase its capital stock.

The preamble sets forth that that company is "*now considering a plan of so increasing the capital stock of said company as will enable said company to have a full paid capital of \$2,000,000.00.*" But nowhere is it made *incumbent* upon the corporation to increase its capital. On the contrary, it is left optional with the petitioner company itself to increase its capital or to pay the contract price in money.

That it was never intended that the De La Vergne Company should be understood as *agreeing* to increase its stock for the purpose of carrying out this particular contract, is also made evident by the testimony taken on behalf of said defendant, which establishes that the stockholders of that company were already arranging for an increase of its capital before the beginning of the negotiations with these plaintiffs, to-wit: February 4, 1891, and consent of almost all the stockholders had been obtained. (Record, p. 208.)

But even if the defendant corporation had *agreed* to increase its stock, and to pay plaintiffs in stock of the increased issue, that would furnish no defense to these actions, for if it could not have been forced to pay in the manner agreed upon, it could still have been required to do so in another form.

This point is clearly passed on in the case of *Hitchcock v. Galveston*, 86 U. S., 51, where the City of Galveston agreed to pay plaintiff in bonds to be issued by it for certain street improvement work. It was held that although it was beyond the power of the city to issue the bonds, as it had agreed to do, that fact would not relieve it of making compensation in money. The court declared that: "The promise to give bonds to plaintiffs in payment for what they undertook to do, was therefore at farthest only *ultra vires*, and in such case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform.

To the same effect, *State Board v. Railway Company*, 47 Ind., 407.

*Parish v. Wheeler*, 27 La. Ann., 449.

*Fort Worth City Co. v. Smith Bridge Co.*,  
151 U. S., 294.

## II.

The doctrine of *ultra vires* does not apply to this case because the stock certificates mentioned in the

contract were no longer valid certificates of subsisting stock in the Consolidated Ice Machine Company.

Counsel for petitioner assumes that the contract was made for the acquiring of stock when such is not the case in fact, and the courts have uniformly given the same a different construction. The language of the opinion rendered by the full bench of the Circuit Court of Appeals on the first hearing of this case, and the short opinion *per curiam* at the last hearing, leave no room for doubt that the contract in this case was a sale of the rights of the Consolidated Company to re-acquire its property from the assignee in accordance with the Illinois law, or on payment of its liabilities, and the right to the surplus remaining over at the termination of the proceedings of the assignment. The assignment of the so-called certificates of stock of the Consolidated Company was also contracted for in said agreement, as held in those opinions, and it was this fact, that it was one of the elements of the agreement, that led to the division of the judges on the single question, as to whether or not the contract was made *ultra vires* the De La Vergne Company on that account.

Counsel for petitioner, with apparent seriousness, say "if an equity existed it belonged to the corporation and not to the shareholders. If the corporation had anything to convey the transfer would have been in the name of the corporation by its proper officers thereunto duly authorized. If the other party to the contract failed to pay the consideration, the corporation, not the shareholders,

"either jointly or severally, must bring action thereon "to obtain redress." We answer that the *corporation did make the transfer in its own name by its officers duly authorized*, every shareholder, in addition to the corporation, signing the contract and joining in the conveyance, thus manifesting assent thereto and authorizing the same to be made by the corporation.

It is conceded by counsel for petitioner that the Consolidated Company, the assignor, was entitled to any surplus which might arise from the realization upon the assets after the payment of all of its creditors. A careful investigation of these assets and liabilities by the De La Vergne Company's agent disclosed that the right to said surplus was reasonably worth the price which was agreed to be paid therefor in stock or cash. It is evident from an inspection of the contract that the Consolidated Company acted in good faith and made no pretense that it was entitled to the immediate possession of any such surplus, or of any of the assets from which such surplus was to arise, or that the De La Vergne Company was led to expect anything more than it was given, namely, a valid conveyance of the rights aforementioned by the Consolidated Company, concurred in by all of its stockholders.

By this conveyance the De La Vergne Company was given a right to demand the surplus whenever it was ascertained and determined; an immediate right to all the assets of the Consolidated Company, including its good will, upon payment of the demands of all its creditors; a valid subsisting right for ten years to enjoin all the stockholders of the Consoli-

dated Company from entering, directly or indirectly, the business of selling ice and refrigerating machinery in these United States outside of Montana, excepting merely in the business of the De La Vergne Company, and to recover damages for a breach of the covenant assumed by the said stockholders in that regard. These rights were acquired by the De La Vergne Company immediately on the delivery of the conveyance and no subsequent assent of the Consolidated Company, or of any of its stockholders, was required to fortify or give validity to these rights; nor was it within the power of said last named company or of its stockholders to undo, recall or rescind said conveyance or annul these rights so long as the De La Vergne Company complied with or stood ready to comply with its obligations under the agreement.

That the De La Vergne Company did not see fit to avail itself of such of these rights as required immediate action to be taken in order to be secured, does not justify the position taken by counsel for petitioner, and which is urged with so much persistency that nothing was acquired by the contract except the certificates of stock therein referred to.

It will not avail a purchaser of the equity of redemption in real estate in defending a suit for the purchase price to make answer that the property has been sold under the deed of trust or mortgage resting on the same and did not realize sufficient to discharge the prior lien, any more than the vendor will be permitted to successfully claim any large amount which such a vendee is enabled to gain by

reason of a sale of the equity for a price largely in excess of the purchase price.

What was the position or legal status of the certificates of stock under this agreement? It is evident from the contract that the Consolidated Company had bound itself not to continue in the business in which it had been engaged when it sold all its rights of every kind in its assets, including its good will in said business. Such a sale was tantamount to a covenant on its part not to engage any further in its business. Its assets of every kind were in the hands of an assignee for administration under the insolvent law of the State of Illinois. These assets were first bound for the discharge of the company's liabilities, and the surplus, if any, would have been returned to the company for distribution among its stockholders, in accordance with their respective rights as holders of stock. The obligation to return to the stockholders this surplus arose immediately upon the receipt of the same by the Consolidated Company by reason of the fact that it had bound itself, by consent of all its shareholders, not to continue the business for which it was chartered. By transferring its right to the surplus, as was done by the contract in evidence, it was placed at once in the position in which it was proper to receive the covenant on the part of the purchaser to deliver and pay the purchase price direct to the shareholders in the proportion in which the shares were held by them. Such a payment, or the acceptance of the covenant to pay, completely satisfied and discharged the shares or stock held by said stockholders and left the certificates in the position in which the evidence

of ownership of shares in a defunct or wound-up corporation would be in—evidences of rights which had been fully discharged and satisfied. The papers or certificates of stock transferred under this agreement were exactly in the position or legal status set forth as above.

The *right* to the surplus or equity of redemption in the assets in the hands of the assignee had passed to the De La Vergne Company. The certificates of stock no longer represented any interest therein, and it is questionable whether or not sufficient life remained in the certificates to justify the holders thereof in giving any assent to the taking of the assets out of the hands of the assignee under the law of Illinois with the consent of a majority of the creditors in number and amount. But whether such power remained in the certificates or not was immaterial as far as the obligation of the De La Vergne Company was concerned, inasmuch as the Consolidated Company did not assume to convey that right, but only such rights as the circumstances surrounding the assets would enable it and its stockholders to convey.

If our position be correct, therefore, that these so-called certificates of stock of the Consolidated Company, which its stockholders covenanted and agreed to assign, were such in name and form only and not in substance, then they did not represent that which it is contended the law prohibited the De La Vergne Company from acquiring and the doctrine of *ultra vires* cannot be said to be applicable thereto.

The position taken by respondents was concurred in by the Circuit Court of Appeals in so far as the

shares were deemed merely a *shell* from which the substance had been taken, and is also confirmed by the conduct of the petitioner herein who failed to set up in its answer a claim by way of set-off for the value of such shares as were not fully conveyed to it as per their contention on the first trial.

### III.

On the theory that the contract may possibly admit of the construction contended for by counsel for petitioner (but which theory we cannot concede) we submit that the construction contended for by us as hereinbefore set forth, is equally justified, and being in accord with the intent of the parties, and with a lawful purpose, ought to be upheld.

It is an elementary principle, "that where a contract admits of both a legal and illegal interpretation, it will be construed in its lawful sense, for the presumption is that the parties act in conformity to law."

This principle was early enunciated by Lord Lyndhurst in *Shore v. Wilson* (9 Clark and F., 397), who there said :

"The rule is this, and it is a fair and proper rule, that where a construction, consistent with lawful conduct and lawful intention, can be placed upon the words and acts of parties, you are to do so."

Lord Coke announced the rule to be as follows : "It is a general rule that whensoever the words of a deed, or the parties without deed, may have a double intendment, and the one standeth with the law and right, and the other is wrongful and against law, the

intendment that standeth with law shall be taken." (Co. Lit., 42, 183.)

In the case of *Ormes v. Dauchy* (82 N. Y., 443) it was said: "The law will not presume an agreement as void or illegal or against public policy; when it is capable of a construction which would make it consistent with the law and valid, it can not be considered as illegal."

In the early case of *Archibald v. Thomas* (3 Cow., 284), the learned judge in his opinion says: "But my opinion is based on the ground that where a contract admits of two significations, that ought to be adopted which renders it operative, rather than that which renders it null and void."

The rule is stated by Bishop in his work on Contracts (Sec. 392) to be, "If the terms admit of two meanings, or two ways, of effecting the object, by one of which the thing would be unlawful, and by the other lawful, the latter construction *must* be adopted."

And the principle has been upheld and approved in many cases cited by the learned author.

Applying the foregoing authorities to this cause, in which every question has been decided in favor of these respondents by the trial court, and every other question twice by the Circuit Court of Appeals, we submit that only such a construction should be placed on the contract as will render it lawful and operative, as was the evident intent of the parties when the same was made.

## IV.

The petitioner, not content with the decision by both judges of the Circuit Court of Appeals, as to the other questions presented by the record, now seeks the review of this court by complaining that the trial court erred in refusing to make declarations of law upon the issue of law raised by the 6th, 7th and 8th pleas of the answers; this matter was presented by the petitioner in the trial court upon the close of the case by a request to declare ten abstract propositions of law (Rec., pp. 414, 415, 416).

We believe we sufficiently meet this objection by referring the court to the case of *Mercantile Mutual Ins. Co. v. Folsom*, 18 Wall., 237, in which it is held that where a case is tried before the court, upon a waiver of a jury, its refusal to grant conclusions or declarations of law does not constitute error.

The trial court was not silent upon any issue of fact presented by the pleadings. It found the ultimate facts which fully support the judgment and merely declined to make unnecessary declarations of law.

It is a well-established practice that where a case is tried, as this was, by the court without a jury, its findings upon questions of fact are conclusive in the Federal appellate courts.

*Stanley v. Albany Co.*, 121 U. S., 535.

*Allen v. St. Louis National Bank*, 120 U. S., 20.

*Bridge Co. v. Railroad Co.*, 92 U. S., 315.

And when a court to which a case has been so submitted, without a jury, has found the facts specifically, as did the court below, the only question open upon a writ of error *is the sufficiency of the facts found to support the judgment*; and the appellate court will not inquire whether the evidence was sufficient to support the *findings*.

*Wile v. Farmers' State Bank*, 17 C. C. A., 25; s. c. 70 F. R., 138.

*Minchen v. Hart*, 18 C. C. A., 570; s. c. 72 F. R., 294.

*Woodbury v. Shawneetown*, 20 C. C. A., 400, s. c. 74 F. R., 205.

Nor is error in the findings of facts subject to revision, if there was *any* evidence upon which such findings could be made.

*Hathaway v. Bank*, 134 U. S., 494.

It is scarcely necessary to do more than state these propositions, drawn from the cases cited, to show their application to the case at bar.

Counsel also argue that the court below erred in failing to make certain findings requested on behalf of petitioner. A mere glance at the findings so requested will indicate that they were not findings of ultimate or final facts, but a rehearsal of evidential facts, from which certain conclusions of fact could be reached.

We submit that the court below properly declined to find the facts, in the sense that it was bound to set out the evidence in the case.

"The refusal of the trial court to find immaterial or *incidental* facts, amounting only to evidence bear-

ing on the *ultimate facts found*, is not a proper subject of review."

*Hathaway v. Cambridge First Nat'l Bank*,  
134 U. S., 494.

"A special finding of facts by the court need only state the *ultimate facts*, not the evidence."

*Mining Co. v. Taylor*, 100 U. S., 37.

## V.

If this were a case which the Circuit Court of Appeals had deemed of general importance and peculiar gravity, or a case requiring the exercise of a higher jurisdiction to secure uniformity of decision, it would have been its privilege and duty under the law to have so declared, and to have certified any question therein, or the whole cause to this court for adjudication. The fact that said court did not so certify indicates that this cause is not one of general importance and peculiar gravity, and does not require the exercise of a higher jurisdiction to secure uniformity of decision, and hence does not belong to the class of cases which is entitled to be heard by the Supreme Court.

The case does belong to that large class of cases which Congress, when creating the Circuit Courts of Appeals, intended and expected those courts to decide as courts of last resort, and thus relieve the Supreme Court of some of its immense burdens.

In *Ex parte Lau Ow Bew*, 141 U. S., 583, this court held that a grave question of international law was involved, and that such a matter was of sufficient importance in itself and sufficiently open to controversy to justify the issuing of the writ.

In the case *In re Woods*, 143 U. S., 202, the construction of a Minnesota law was involved, but the court held that the case was not of sufficient importance and peculiar gravity and hence denied the writ.

In *Cunard S. S. Co. vs. Fabre*, an admiralty cause, an important question as to the rules of navigation was involved and deemed of sufficient importance and peculiar gravity and hence the writ was granted.

In the case of *Harman v. Harman*, lately decided, the Circuit Court of Appeals, as we have been informed, on the same record reached entirely different conclusions, and hence, in order to secure uniformity of decision, the court granted the writ.

What is there in the case at bar to justify the exercise of this high jurisdiction which has been so often denied and so rarely exercised?

This case with substantially the same record has had two hearings in the Circuit Court of Appeals and the same ultimate conclusion has been arrived at each time, thus preserving uniformity of decision. Upon the last hearing the judges of that court have divided upon only one question, which, upon the first hearing in that court, was presented in brief but not deemed worthy of mention in the opinion. The case presents nothing of general importance and peculiar gravity.

Petitioner, when confronted with the duty of stating reasons for its petition, alleges that the Circuit Court, when deciding this case, failed to decide or adjudge the question of *ultra vires*, which position the Circuit Court of Appeals by its decision nega-

tives ; complains of the law which requires an affirmance of the judgment of the trial court when the appellate court is equally divided upon any decisive question, and alleges that such an affirmance is no judgment at all ; and then complains that it has had no finding by the trial court upon the issues of law presented by its *ultra vires* pleas, no trial by the Circuit Court of Appeals on that question, and urges that such an extraordinary situation is presented which requires the issuance of the writ of certiorari.

Respondents respectfully submit that petitioner does not claim that this case is one of general importance and peculiar gravity, or requiring the exercise of this Honorable Court's jurisdiction to secure uniformity of decision, and respondents confidently urge that the case as presented does not belong to the class of cases in which this Honorable Court has seen fit heretofore to exercise its extraordinary jurisdiction of granting writs of certiorari, and hence respondents respectfully submit that a fifth hearing should be denied.

ELENEIOUS SMITH,  
B. SCHNURMACHER,  
LEO RASSIEUR,

Attorneys for Respondents.